

UNITED STATES OF AMERICA  
POSTAL REGULATORY COMMISSION  
WASHINGTON, DC 20268-0001

Valassis NSA

Docket No. MC2012-14

Docket No. R2012-8

**COMMENTS OF NATIONAL NEWSPAPER ASSOCIATION, INC.  
ON THE POSTAL SERVICE'S PROPOSED NEGOTIATED SERVICE AGREEMENT  
WITH VALASSIS, INC.  
(May 23, 2012)**

Pursuant to Presiding Officer Order No. 1330, National Newspaper Association hereby provides comments on the proposal of the United States Postal Service to initiate a Negotiated Service Agreement (NSA) with Valassis, Inc. NNA believes the proposed agreement does not meet the criteria of the Commission's rules for NSAs in 39 CFR 3010.40. Specifically, NNA believes the proposed NSA violates 39 CFR 3010.40(b) and 39 USC 3622(c)(10)(B) because it will cause unreasonable harm to the marketplace. The proposal also violates 39 USC 3622(b)(8), which requires a just and reasonable schedule of rates. The proposal fails to take into account the effects upon private enterprises engaged in the delivery of mail matter other than letters as required by 39 USC 3622(c)(3). The proposal injects unfairness into the rate schedule that impacts mailers engaged in providing educational, cultural, scientific and informational value to the recipients of mail matter identified in 39 USC 3622(c)(11). NNA requests a Commission finding that the proposal is inconsistent with the policies and intent of the Postal Accountability and Enhancement Act.

**I. Background**

National Newspaper Association (NNA) frequently appears before the Commission on behalf of newspaper mailers. NNA has been a participant in many dockets governing service offerings and service standards, the postal network and the

provision of post office services, most recently Docket Nos. N2012-1, N2011-1, N2010-1 and N2009-1. NNA has represented community newspapers since 1885 and has helped to shape postal policy for most of its 127-year history. Typically, NNA is recognized as an advocate for small-town weekly and daily newspapers that are heavily dependent upon the mail. NNA's membership, however, also includes daily and weekly newspapers that operate in the suburbs of New York; Chicago; Dallas; Los Angeles, New Orleans and Baton Rouge, LA; Portland, OR; Minneapolis; Philadelphia, Boston and other major metropolitan areas. Virtually all of NNA's members operate in competitive advertising environments where the Postal Service's rates and policies impact competition. And virtually all are also dependent upon the mail for distribution of newspapers, advertising publications like shoppers and Total Market Coverage (TMC) vehicles, niche publications and regular business correspondence that includes the bills and payments that keep small businesses alive.

The health and viability of the Postal Service, therefore, is a primary goal of NNA's postal program. It is rare for the NNA to actively oppose a program that the Postal Service believes will secure its sustainability. NNA, for example, has not appeared in any Negotiated Service Agreement docket since the passage of the Postal Accountability and Enhancement Act of 2006.

But when the postal program endangers the survival of the newspaper, NNA must oppose. This docket represents such a danger. Not only the direct impact of this NSA, but the direction would take the Postal Service are deep concerns. It represents an imminent threat to the ability of some community newspapers to remain in business, a longer-term threat to others. If the NSA succeeds in its strategy, it would seriously diminish the newspapers' ability to provide the quality news coverage their readers expect.

## **II. The Commission bears a heavy burden to protect competition within the marketplace.**

This case represents only the second proposed Negotiated Service Agreement within the market dominant product categories since the Postal Accountability and Enhancement Act of 2006 was enacted. Although the Commission has approved more than 200 NSAs in the past two years, all but the Discover NSA of 2011 have been on the competitive side of the Postal Service's product offerings. The appearance of this proposal--the first in recent history to openly position the Postal Service in direct competition with newspaper advertising--presents a case of first impression to the Commission.

The Postal Service in this case proposes to provide deeply discounted Standard Mail postage rates to the large national advertising aggregator, Valassis, Inc., in exchange for Valassis's commitment to add an additional million mail pieces within 12 months of the starting date of the NSA. The Service acknowledges the competitive purposes of its proposal when it states in its notice of filing:

"Saturation mailers are increasingly looking to private delivery options, and newspapers are extending their reach through Total Market Coverage and Sunday Select (distribution to non-subscribers) delivered via non-postal carriers. This poses challenges to the Postal Service in maintaining and growing its volumes, and increases the need to build programs that are competitively priced with a high value delivery service. With the right offer, the Postal Service can take advantage of recent market trends and make the best use of Postal Service capabilities. Notice of the United States Postal Service of Filing of Contract and Supporting Data and Request to Add Valassis Direct Mail, Inc., Negotiated Service Agreement to the Market Dominant Product List, April 30, 2012 (Notice), at 3.

The Service's intention is purely competitive and is geared toward a special deal with one large and historically favored customer. There is neither pretext to fairness nor quantification of the perceived migration by newspapers to private delivery. Certainly, there is no consideration of the effects upon the advertising marketplace. Rather than proposing rates and service for Standard Mail products that newspapers as well as smaller direct mail users can use and that might fairly address the perceived competition from private distributors to get newspaper customers back, USPS is going

straight for the jugular. The Postal Service appears to want the newspapers' revenues but not necessarily their business.

**A. The Commission is principal regulator of competition in the market-dominant product marketplace, as well as of the Postal Service's participation in the markets at large.**

In the normal business world, pricing competition is regulated by state and federal fair competition and antitrust laws.

In 2004, the United States Supreme Court found the Postal Service immune from suit under the principal federal antitrust law, the Sherman Act. In a case brought by a manufacturer of mail sacks accusing the Service of attempting to secure a monopoly over sacks, the court decided USPS could not be sued. United States Postal Service v. Flamingo Industries, USA, 540 U.S. 736; 124 S. Ct. 1321; 158 L. Ed. 2d 19 (2004). Ruling that the Postal Service is more like the federal government than like a company, the court said:

"The Postal Service has different goals, obligations, and powers from private corporations. Its goals are not those of private enterprise. The most important difference is that it does not seek profits, but only to break even, 39 USC § 3621 [39 USCS § 3621], which is consistent with its public character. It also has broader obligations, including the provision of universal mail delivery, the provision of free mail delivery to the certain classes of persons, §§ 3201-3405, and, most recently, increased public responsibilities related to national security. Finally, the Postal Service has many powers more characteristic of Government than of private enterprise, including its state-conferred monopoly on mail delivery, the power of eminent domain, and the power to conclude international postal agreements." at 747.

The Court went on to emphasize the importance of the Commission in restraining anti-competitive behavior by the Postal Service. It seems to suggest the Service may have the impulse but not the ability to violate antitrust policy because it does not have

sole power to set rates. The Service, it said, lacks the most critical power to control the market: it cannot set its own rates. Id.

**B. Both PAEA and the guidance of the Flamingo court apply to the NSA proposal.**

Flamingo preceded the authorizing statute under which the Postal Service now operates and by which NSAs are now governed, the Postal Accountability and Enhancement Act of 2006. Reacting to the court's finding that the Postal Service could engage in predatory behavior without its competitors having recourse to the courts, Congress gave the Postal Service its own restraint of trade statute. It said the Postal Service may not:

"establish any rule or regulation (including any standard) the effect of which is to preclude competition or establish the terms of competition unless the Postal Service demonstrates that the regulation does not create an unfair competitive advantage for itself or any entity funded (in whole or in part) by the Postal Service. 39 USC 404a."

The statute is clear. The burden is on the Postal Service to demonstrate that its actions do not create an unfair competitive advantage. Whether the statute specifically overrules Flamingo and opens USPS to federal antitrust enforcement for activity on the market dominant side of its activities is not entirely clear. Given the Court's heavy reliance upon the Commission's role in protecting against anti-competitive behavior by USPS, it is reasonable to assume Congress expected the Commission to continue to play that role, possibly in addition to the oversight of federal courts, and to use new section 404a to inform its work.

The Flamingo court emphatically sets out its expectations for the Commission: it must keep the Postal Service focused on its public service obligations, which includes using its participation in rate-setting to keep prices from becoming anti-competitive. In other words, the Postal Service may wish to use its powers unfairly, but the Commission

has the obligation to ensure that it does not. In this case, it must also make sure rates are just and reasonable (39 USC 3622(b)(8)).

The case presents the Commission's first opportunity to explain how it will regulate the Postal Service's desire to use its market dominant powers to favor its own position in competition within the market dominant categories, and in particular where there are untold numbers of small competitors operating in the marketplace, both within the mail and outside of it. In so doing, the Commission must grapple with the possible effects upon competition itself, but also upon the American public as well as upon the Postal Service.

### **III. The Commission must require the market analysis that is missing in the docket.**

#### **A. Large newspapers are clearly in the Postal Service's bulls-eye.**

Here the Postal Service has set its sights on growing its mail volume by cutting a deal with a favored customer. The intended loser in the deal is the newspaper that carries the preprinted advertising of durable and semi-durable goods merchants that Valassis presently aggregates and variously places in newspapers or in the mail. When those newspapers are operating out of the mail stream, the Postal Service apparently considers them fair game, and not beneficiaries of its obligation to avoid uncompetitive impacts upon marketplaces, even if they encompass non-postal players. But it takes no care even to protect its own large newspaper customers that remain in the mails.

Its miscalculation of the impact of its proposal carries grave implications for larger newspapers that are on the receiving end of the Postal Service's blows. The NSA could deliver a final blow to historic but struggling metropolitan newspapers that have already been weakened by the impacts both of the Internet and the Great Recession. Note, for example, the comments of the Journal Sentinel filed on May 22, 2012: "The NSA could theoretically put over half our entire Sunday preprint revenue in jeopardy."

**B. Smaller newspapers are equally fearful of this NSA.**

What the Postal Service apparently does not understand is that the NSA would have an impact upon smaller newspapers as well.

The Postal Service evidently requested this NSA under the assumption that no impact upon the marketplace occupied by smaller newspapers would be felt. Or, rather, it did not consider the possibility that disruption could occur. In its original filing, its response to the requirement that it consider impact upon small business as follows:

"The Postal Service has no information on the extent to which small businesses currently deliver advertising from the national retailers that are encompassed by this agreement. Attachment E Statement of Supporting Justification, Notice, p. 4.

To further explore this undeveloped information, the Chairman posed the following question and got a similar statement of agnosticism about small newspaper impact:

Q. To the extent that any newspapers are considered small businesses, what could be the effect on them, as relates to their financial survival?

A. Valassis' existing shared mail programs are primarily located in large to mid-size metropolitan markets where the primary newspaper competitors would not be considered small businesses.

Moreover, to the extent that there are newspapers that would qualify as small businesses in Valassis' existing markets, the NSA restricts Valassis to the carriage of advertising from national durable and semi-durable goods retailers. This excludes advertising from local and regional retailers that operate in fewer than 30 states, as well as all non-durable goods retailers such as grocery and drug stores, fast food and restaurants, and service businesses that likely account for a substantial portion of the advertising carried by small newspapers that would qualify as small businesses. Such newspapers can distribute their products – and any national retailer circulars they may include with their editorial content – either through low-priced Periodicals rates or through low-cost private delivery arrangements. Thus, they appear positioned to compete effectively, even under these contract rates. Response of the United States Postal Service to Chairman's Information Request No. 3, May 21, 2012 at 5-6.

The statement implies that there was market analysis done by USPS involving smaller newspapers. The absence of consideration leads to a suggestion that its impressions may have been provided by Valassis, which is also a newspaper insert customer--but which has a clear motivation in this case to engage in behavior that lowers its own prices both in the mail and in newspaper products. Without knowing what the Postal Service considers a small business or a small newspaper, it is impossible to guess whether the Service simply ignored the obligation to examine the marketplace closely or believed what it wanted to believe: that smaller newspapers do not carry advertising for durable and semi-durable goods.

But the record existing even before the filing deadline demonstrates that some newspaper companies do believe there will be grievous impact upon them from this NSA, including the comments of Times Publishing Company in Erie, PA; the Brookhaven (MS) Daily Leader and Landmark Publishing, which operates daily newspapers in medium-sized cities as well as the Landmark Community Newspapers.

If evidentiary hearings were held in this matter, the Commission would likely learn two things: 1) Smaller newspapers do carry advertising for hardware stores, soft goods retailers, department stores, discount houses and the like and that the revenue is critical to their survival; and 2) Publishers of some of those newspapers think it conceivable that the motivation in this matter by Valassis is not purely to create new mail, but to use Postal Service's discounted pricing as a lever to demand lower insert prices from newspapers. If those concerns were to prove correct, this docket could lead to damage to the newspapers without creating any new mail volume or revenue for the Postal Service.

The obligation is upon the Postal Service to demonstrate that there is no unreasonable harm to the marketplace at large, not just to postal stakeholders. It is the Commission's serious duty to ensure that such demonstration is made. That publishers believe there will be harm should be evidenced by the volume of filings already in the



comment files. What is unreasonable? If the Journal's prediction of the loss of half of its revenues on Sunday--the most important day of the week for a daily newspaper--were to come true, it would be hard to characterize the harm to it as anything but alarming, unfair and unreasonable.

The competition in question in the docket is not simply competition among private sector mail owners and aggregators. It is competition from the government-owned Postal Service, to which the Flamingo court attributed only public service motives, held true by Commission enforcement.

### **C. The net impact upon the Postal Service may be equally harmful.**

The Service characterizes the need for this filing as grounded in its belief that private delivery forces are pulling newspapers out of the mail with their TMC and shopper programs. The letter from Landmark Publishing substantiates the belief that less costly distributors are available. But the Landmark comment also points out the value of the mailbox, an element that is obviously keeping many of its newspapers' advertising publications in the mail even when some of them have pulled out. No doubt before the comments file is closed other newspaper companies will echo similar patterns.

Some, like the Brookhaven Daily Leader, aver that the NSA will force it out of the mail for its TMC and into its own newspaper delivery force. With consequences like this, the Postal Service itself should have deep reservations about its proposal. If other customers like the Leader have similar intent, USPS will give away discounts to one customer and lose a myriad others as a consequence.

But the Postal Service obviously has not considered three possible outcomes of its NSA.

One is that many of its existing newspaper TMC and shopper mailers will leave the mails as a result of this NSA, being unable to afford the luxury of the valuable mailbox. When the Valassis buyer for the popular RedPlum Sunday package that appears in many, many newspapers comes calling, the newspaper advertising manager will have to match the net price Valassis expects to achieve with its rebates so they can keep their existing durable and semi-durable goods advertisers from the Valassis inserts in the newspaper. Result: the newspaper keeps the customer and the Postal Service gets no mail piece either from Valassis or from the newspaper TMC which has fled the mail out of necessity.

The other is that although Valassis could indeed move the advertising piece out of the newspaper and into the mail stream, neither Valassis's presence as a mailer in any given local market nor the presence of any similarly-situated mailers that could be candidates for this NSA, is necessarily a sustained presence. Direct mail programs are notoriously short-term residents in many communities, particularly smaller ones. Because the entry barrier is low, they come in when they have three or four advertising contracts and when they are dropped by one or two retailers, they lose profitability and they leave. The newspaper remains throughout, possibly in the mailstream, but under the NSA conditions more likely newly-ejected from it. If Valassis program--or its similarly-situated twin--leaves the market after engaging in the NSA, the newspaper is likely to regain the advertiser. Result: Postal Service has driven away its traditional dance partner in exchange for one that may simply be interested in a date or two.

The third and most dangerous to postal stakeholders is the obvious one: the Postal Service has ignored the fact that many, many newspaper TMCs and shoppers are in the Standard High-Density mail stream now. This is because most newspapers must create adjunct advertising publications to reach non-subscribers, or to get their advertisers' messages into homes where a newspaper reader may have bought the paper at a newsrack on the way to work and therefore did not appear on the subscriber list. Because the TMCs "skip-deliver" only to nonsubscriber households, a mailing may

not qualify for the Saturation rates that require delivery to 90% of the households in a carrier route. Newspapers then pay the higher High-Density rates or even Basic rates.

So the NSA that pulls the advertising piece out of the newspaper High Density-rated TMC product and into any Saturation product--not to mention a steeply-discounted one--is the most destructive one for the Postal Service's bottom line. This NSA trades a minimum \$27 per 1,000 or higher in USPS revenue for a lower net revenue from an identical product. Result: both the Postal Service and remaining stakeholders in the mail stream face potential additional financial losses to USPS. The possibility that USPS is leaving money on the table has haunted NSAs from their beginnings. That likelihood is abundantly present here. The fact that the Postal Service clearly has not performed an analysis of the mail piece migration possibilities makes the NSA even more suspect. If USPS had fully considered this potential harm to its own bottom line, this NSA likely would never have been filed.

The most puzzling aspect of the Postal Service's filing is in its belief that newspapers are leaving the mail for lower-priced distributors. Why, one must ask, would it not then provide a lower price and better service for all of its mailers so it could keep the customers it has rather than drive them out of the mail for the sake of one deal with one customer that will require intensive oversight, considerable administration and controversy over its decisions. As always, the classification and pricing power is the one that is the most likely to be just and reasonable. An across-the-board classification that serves both large and small customers is the easiest to administer, the most durable and the least likely to encourage migration from one part of the mail stream to another with a net loss to the Service. If the Service hasn't already thought of that, the Commission should invite it to do so.

#### **IV. Because competition with newspapers is the core of the NSA, ECSI values must be considered.**

PAEA requires recognition in the rates and classification statutes of the educational, cultural, scientific and informational values that have been a part of the Postal Service's glorious tradition in binding the nation together. 39 USC 3622(c)(11). Though that requirement is articulated in part in the Periodicals rates, the Commission cannot overlook the damage to those values that will result if this one, single advertising discount deal with a powerful national competitor does force newspapers out of business.

NNA refers the Commission to its Library Reference on Community Newspaper Readership, filed May 22, 2012 as N2012-1 1/2. That market research shows compellingly that people depend upon newspapers for their local news. No Facebook, Twitter, Google or You Tube has replaced the need for the local newspaper. And no social media network is fielding reporters to cover the city council, the local elections, the schools and the community activities. Newspapers still provide that glue that holds communities together as they depend upon the Postal Service to bind the nation together. Take away the newspaper's advertising revenues and the glue melts. Not even a Periodicals rate is enough to make it harden again.

#### **V. NSAs that impose a single large competitor onto markets served by many small ones are inherently unjust and unreasonable.**

The Postal Service acknowledges in its filing that if it finds another company that serves national markets with local retail presence, can come up with an additional million pieces a year and is prepared to go through the exercise of filing for a "similarly-situated" NSA, USPS is prepared to provide a contract. There likely are other large advertising aggregators interested in qualifying, a fact that deepens the alarm of newspapers.

The problem, of course, is that few if any local businesses being displaced by this NSA will be able to come close to matching the scope and scale of a Valassis. Local advertising is a unique market and it is plenty competitive. It includes many small, local companies. Not just community newspapers but local shoppers, local direct mailers and mail-service providers, door-hanger services, local radio and TV and even school and nonprofit publications compete at the local level for advertising. They provide the ad sales people who help an advertiser find the best position and reach for its market. They develop the local relationships. They help to create the community by making sure the businesses are well-served. But by their nature, they will not have the giant footprint of a Valassis or its predecessor company ADVO, Inc. Permitting one or a few large scale companies to partner with a government service to drive out these small-players would leave the local communities impoverished indeed.

This is the sort of NSA that newspapers have long feared, since USPS began down the path of cutting contract deals. If it is implemented, it will materially change the newspapers' ability to serve their communities. It will also change these smaller companies' relationship with the Postal Service.

## **VI. Reject Advertising NSAs**

There can be no fairness in an NSA where markets contain multiple small competitors but the terms of the game are that only the big guys can play. This is exactly the sort of pricing power the Flamingo court clearly expected the Postal Service to use fairly and the Commission to regulate wisely. The Service is not a private entity whose economy-of-scale economics are the sole driving force of policy and business decisions. It remains, as Flamingo pointed out, an arm of the government that is supposed to have public service motivations at its heart.

NNA believes advertising-based NSAs are likely to be inherently unfair and anti-competitive because they pit the powers of the federal government against those of private businesses. The motivation and intent of this one demonstrates why that is

likely to be so. The Postal Service believes it has lost business, and therefore wishes to use its market dominating forces to suppress the competition and punish the players that abandoned its offerings.

Precisely because a thriving local advertising market--even one that is influenced by national durable and semi-durable goods businesses--contains so many smaller players, there is no pricing or qualification mechanism that can cure an advertising NSA that is predicated upon scale and volume. This is particularly so long as some of the market competition comes from players outside the mail stream. Besides the inherent disproportionality of the market power of the Postal Service and its large potential partner here, the Commission cannot ignore the fact that declining service and threats of rising prices presently coming from the Postal Service threatens to push newspapers unwillingly into private distribution. To permit USPS to use its market powers to punish the newspapers for their self-help would be truly unjust and unreasonable.

## **Conclusion**

NNA acknowledges that the Postal Service is under great pressure to produce mail volume growth. From some quarters, it is also under pressure to shed its government skin and try to act like a private player in the markets even while holding onto the mailbox and the mail monopoly. But it is not a private player and can never be, so long as Congress endows it with universal service obligations, criminal powers to enforce its monopoly and the ability to use its size and scope to disadvantage market participants that do not use the mail.

NNA has stood with the Service on many occasions as it has dealt with threats to its own survival. It is disheartened now to find the Service squaring off against newspapers. NNA believes NSAs in general that are targeted at advertising markets are inherently unjust and unreasonable and that if considered at all, they deserve the strictest of scrutiny. This NSA in particular is egregious because the Postal Service has failed to account for its own obligations to market fairness and has wished away impacts

upon its own mail customers that may end in a significant net loss of business for the Service. The Commission should find that the proposal does not meet the requirements of PAEA.

Respectfully submitted,

Reed Anfinson

NNA President and  
Publisher of the Swift County  
Monitor-News  
Benson, MN 56215-1844

Tonda F. Rush

KING & BALLOW  
PO Box 50301  
Arlington, VA 22205

Max Heath

NNA Postal Committee Chair  
and Senior Policy Adviser  
Shelbyville, KY 40066-0549

May 23, 2012